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No. 03-211

In The

Supreme Court of the United States

DR. MARVIN VAUN FRANDSEN,

Petitioner,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, STATE OF FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The First District Court Of Appeal For The State Of Florida

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE AND FACTS

This case concerns the affirmance by the State of Florida First District Court of Appeal (hereafter "the state court") of a Final Order by an Administrative Law Judge upholding a rule of the Division of Recreation and Parks, part of the Florida Department of Environmental Protection (hereafter "the Department"). The rule addresses expressive activities in state parks.

Petitioner's Statement of the Case includes several erroneous or misleading statements. First, Petitioner's allegation that state park officials have nothing but the text of the rule to guide them, (Init. Brief at 5), ignores the state court's narrow construction of the rule in this case. *See Frandsen v. Department of Environmental Protection*, 829 So. 2d 267, 271 (Fla. 1st DCA 2002) (accepting the Department's invitation to construe the rule narrowly). Second, throughout Petitioner's brief there are references to a "record" that does not reflect facts found by any court or administrative tribunal. (*See* Init. Brief at 5 [alleging Petitioner's own experiences with park officials], 8, 27 [alleging a ban imposed by park officials on sound amplification].) In his administrative appeal, Petitioner dropped any challenge to the rule as applied to him and also dropped his challenge to an agency statement alleged to be an unadopted rule, the letter attached to Petitioner's Initial Brief herein, (Init. Brief App. at 28). (Final Order, Init. Brief App. at 32-33.) Because the "as applied" challenge was no longer an issue, the Administrative Law Judge made no findings of fact with regard to any park official's application of the rule in question to Petitioner or

to anyone else.[1] Contrary to Petitioner's assertions, (Init. Brief at 9, 11), the face of the rule neither authorizes park officials to impose restrictions on speech nor creates any penalty for violation of a park official's instructions. As narrowly construed by the state court, the only sanctionable conduct in the rule ("shall not") is actual creation of a safety hazard or physical interference with other park activities. *Frandsen*, 829 So. 2d at 271; Fla. Admin. Code R. 62D-2.014(18) (Init. Brief App. at 27).

In the Final Order affirmed by the state court, the Administrative Law Judge found: The Department adopted its free speech rule in 1996 "to inform the public that free speech activities are welcome in state parks," (Init. Brief App. at 37); ". . . people are free to conduct any activity they choose so long as the manner in which they do it does not infringe on other park visitors' purpose for coming to the park," (*id.* at 37-38); the rule "does not require contact with a park manager before engaging in" expressive activities, (*id.* at 39); and "[t]he Rule contemplates that the public *may* contact a park manager to ensure that a planned activity will not create a safety hazard or conflict with other planned activities," (*id.* at 39 emphasis added).

On appeal the state court held that the rule does not operate as a prior restraint because "[a] park visitor need not obtain a permit or license prior to engaging in any free speech activity under the rule." *Frandsen*, 829 So. 2d at 269 (citing *United States v. Frandsen*, 212 F.3d 1231 (11th

[1] No arrests have ever been made under the free speech rule. (Tr. at 412.)

Cir. 2000)). The state court quoted and followed this Court's rule of law regarding time, place, and manner restrictions on speech: The restrictions "must be 'justified without reference to the content of the regulated speech, . . . [be] narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Applying the rule of law expressed by this Court, the state court found that the park rule is content-neutral, is narrowly tailored to serve a significant governmental interest, and leaves open ample channels for communication. *Frandsen*, 829 So. 2d at 270-71. As to the first criterion, the rule "is not concerned with the content of the expression but with the operation of the parks"; hence the state court found it content-neutral. *Id.* at 270.

As to the second criterion, the state court relied on this Court's holding that the government has a significant interest in "maintaining the parks . . . in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." *Frandsen*, 829 So. 2d at 270 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984)). Further, the state court found the rule narrowly tailored, applying this Court's holding that the narrow tailoring requirement "is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 270-71 (quoting *Rock Against Racism*, 491 U.S. at 799 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The state court also found the rule met this Court's third

criterion, leaving open "ample channels of communication." *Id.* at 271.

REASONS FOR DENYING THE WRIT

There is no compelling reason for this Court to grant review of Petitioner's facial challenge to a rule that is content-neutral, has been narrowly construed by the state court, and contains no prior restraint on speech. Certiorari review by this Court is "not a matter of right"; it is granted "only for compelling reasons." Sup. Ct. R. 10. The Court may, in its discretion, grant review of an opinion of a state court of last resort that decided "an important federal question" in a way that conflicts with opinions of this Court, federal appellate courts, or other highest-level state courts. Sup. Ct. R. 10(b),(c). However, a petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. For reasons of both comity and practicality, the Court avoids unnecessary review of state judgments. *See Adams v. Robertson*, 520 U.S. 83, 90-92 (1997) (dismissing writ of certiorari as improvidently granted). In the present case, because the state court properly stated the applicable rules of law and followed the decisions of this Court and of federal appellate courts, there is no reason to grant certiorari review.[2]

[2] Petitioner does not allege any conflict with other highest-level state courts.

I. THIS FACIAL CHALLENGE SHOULD BE DENIED REVIEW BECAUSE NO PRIOR RESTRAINT IS AT ISSUE.

Preliminarily, it is unclear under this Court's precedents that Petitioner has standing to bring this facial challenge. (*See* Init. Brief at 29-30, Petitioner's sub-issue IX.) Even in a First Amendment context, Petitioner must satisfy "the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction."[8] *Young v. City of Simi Valley*, 216 F.3d 807, 815 (9th Cir. 2000). In *Rock Against Racism*, this Court stated:

> As a threshold matter, **it is far from clear that respondent should be permitted to bring a facial challenge** to this aspect of the regulation. **Our cases permitting facial challenges to regulations that allegedly grant officials unconstrained authority to regulate speech have generally involved licensing schemes** that "ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity." . . . . Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority.

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[8] The requirements of Article III, Section 1, of the United States Constitution differ from the "substantially affected" test to bring a rule challenge under the Florida Administrative Procedure Act. (*See* Init. Brief at 29.)

Ward v. Rock Against Racism, 491 U.S. 781, 793 (1989) (emphasis added) (citing *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988)).

An important distinction between this rule and the government action at issue in most of the cases cited by Petitioner is that this rule sets up no permitting or licensing scheme or any other prior restraint on speech. Although park visitors may consult park officials about where, when, and how to conduct an expressive activity, they need not do so. On its face, the rule provides no penalty for failing to follow an official's instructions, only for actually creating a safety hazard or interference with other park activities.[4] Because the Department's rule includes no form of prior restraint, all Petitioner's citations to cases invalidating prior restraints on speech are of limited relevance. *See, e.g., Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992) (permit ordinance); *Plain Dealer*, 486 U.S. 750 (permit ordinance); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (ban on distribution of literature); *Shuttlesworth v. City of Birmingham*, 394 U.S.147 (1969) (permit ordinance); *Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515 (11th Cir. 1992) (permit rule); *United States v. Doe*, 968 F.2d 86 (D.C. Cir. 1992) (prohibition of certain decibel level in national parks); *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981) (permit ordinance). In the present case, because

[4] Whether the letter included in Petitioner's Appendix, (Init. Brief at 28), indicates otherwise is not before the Court since Petitioner abandoned his challenge to this letter; however, if the letter did indicate that Petitioner could be penalized simply for failing to follow instructions, it would be inconsistent with the language of the rule itself.

state park officials have no authority to prevent a communication from occurring, they are not censors. *See Rock Against Racism*, 491 U.S. at 795 n.5 (explaining "prior restraint").

First Amendment cases often distinguish between forbidding expression based on *anticipated* problems versus sanctioning *actual* abuse presently occurring. *See, e.g., Beckerman v. City of Tupelo*, 664 F.2d 502, 510 (5th Cir. 1981) (stating that punishment for exercise of First Amendment rights "must be based on a present abuse of rights, not a pre-nascent fear of future misconduct"); *Fernandes*, 663 F.2d at 628 (stating that *prospective* restraints are unconstitutional, but the government may punish an actual "abuse of the privilege to use a public forum"). The rule in question here only sanctions *actual* abuse. At this point it is only "conjectural" to anticipate that Petitioner's exercise of his rights to freedom of speech will be sanctioned based on this rule. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 304 (1979) (rejecting challenge to a statute as "not justiciable"). As in *Grayned*, a decision whether a free speech activity actually disrupts normal activities must be made "on an individualized basis, given the particular fact situation," and if the Government applies a facially neutral time, place, and manner regulation unconstitutionally the courts may deal with that case when it comes. *Grayned v. City of Rockford*, 408 U.S. 104, 119, 121 n.50 (1972) (upholding antinoise

ordinance forbidding disruption of schools while in session).[5]

II. THIS FACIAL CHALLENGE SHOULD BE DENIED REVIEW BECAUSE THE STATE COURT NARROWLY CONSTRUED THE RULE.

This Court has held that a state statute should not be deemed facially invalid unless it is "not readily subject to a narrowing construction by the state courts. . . ." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *see also Wiegand v. Seaver*, 504 F.2d 303, 305 (5th Cir. 1974) (indicating that a statute may be upheld when "it has been authoritatively construed by state courts to limit its application solely to that speech which the state may constitutionally regulate"). This Court has held that the absence of a narrowing construction by a state court is a "*critical fact*" in determining that a law is insufficiently specific. *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) (invalidating a gang loitering ordinance) (emphasis added); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 612 (1971) (invalidating ordinance restricting assembly where no narrowing construction was provided by the state court).

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[5] Petitioner is incorrect in contending that an as-applied challenge to the rule would be impossible because of deference to agency discretion under Florida's Administrative Procedure Act. (Init. Brief at 29.) Even in an administrative appeal, the court must remand or set aside an action if "[t]he agency's exercise of discretion was . . . in violation of a constitutional . . . provision. Fla. Stat. § 120.68(7) (Init. Brief App. at 17-18).

In the present case, the state court narrowly construed the rule in question to prohibit only activities that actually create a safety hazard or physically interfere with other visitors' uses of the park, such as blocking a nature trail or using sound amplification near a nesting site. *Frandsen*, 829 So. 2d at 271. Thus, authoritatively and narrowly construed by the state court, the rule gives "the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *See Grayned*, 408 U.S. at 108. The rule may not be used to avoid "the discomfort and unpleasantness that always accompany an unpopular viewpoint"; rather, the "prohibited disturbances are easily measured by their impact on the normal activities" at the particular location. *Id.* at 117, 112. Given the state court's narrowing construction of the park rule in this case, there is no "compelling reason" for this Court to grant review. *See* Sup. Ct. R. 10.

III. THIS FACIAL CHALLENGE SHOULD BE DENIED REVIEW BECAUSE THE STATE COURT FOLLOWED THE PRECEDENTS OF THIS COURT AND FEDERAL APPELLATE COURTS.

As to Petitioner's first sub-issue (public forum), there is no case or controversy for this court to review because the state does not dispute that Florida parks are public fora. (*See* Init. Brief at 12-13.) Nor is there dispute that even in a public forum speech may be subject to reasonable time, place, and manner restrictions. (*See* Init. Brief at 18); *see also Rock Against Racism*, 491 U.S. at 792 (upholding restrictions on noise levels in particular area of city park in order "to retain the character of the Sheep Meadow and its more sedate activities"). This Court has

stressed the government's interest in protecting public parks and keeping them available to all the people. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984). The state court cited these cases and followed these principles. *Frandsen v. Department of Environmental Protection*, 829 So. 2d 267, 269-71 (Fla. 1st DCA 2002).

As to Petitioner's remaining sub-issues, the state court followed the precedents of this Court and federal appellate courts in upholding the rule. This Court has upheld content-neutral regulations intended "to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous. . . . " *Thomas v. Chicago Park District*, 534 U.S. 316, 780 (2002). Time, place, and manner regulations "stand on a different footing from laws prohibiting speech altogether." *Messer v. City of Douglasville*, 975 F.2d 1505, 1512 (11th Cir. 1992). Such regulations are upheld provided that they are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information." *Rock Against Racism*, 491 U.S. at 791 (quoting *Community for Creative Non-Violence*, 468 U.S. at 293); *accord, Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1523 (11th Cir. 1992).[6]

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[6] Contrary to Petitioner's assertions, (Init. Brief at 20), the state court also followed federal precedent with regard to the burden of proof. Although Petitioner's challenge to the validity of the rule under the Florida Administrative Procedure Act placed the burden on Petitioner, (Final Order, Init. Brief App. at 41), Petitioner's *constitutional* challenge placed the burden on the state to justify the rule. *See Frandsen*,

(Continued on following page)

This Court has stated that the principal inquiry "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Rock Against Racism*, 491 U.S. at 791. In the present case, the state court held that the Department's intent was for its rule to be content-neutral, regulating only the time, place, and manner of park visitors' activities. *Frandsen*, 829 So. 2d at 271. The rule's intent was not to sanitize content, but rather to ensure that free speech activities would be accommodated in Florida state parks. (Final Order, Init. Brief App. at 37.) As narrowly construed by the state court, the rule may not be used to sanction anyone for offending bystanders by a controversial message, only for physically interfering with normal park activities at the particular location. *See Grayned*, 408 U.S. at 117, 112. Thus, Petitioner's "heckler's veto" argument is inapposite. (*See* Init. Brief at 16.)

The state court followed this Court's precedents in holding that the rule advances significant government interests. The government has a "substantial" interest in maintaining parks "in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." *Community for Creative Non-Violence*, 468 U.S. at 296; *see also Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (invalidating a licensing scheme, but noting that the government may prevent "serious interference with normal usage of streets and parks"). The government has a significant interest in avoiding disruption of other activities by those who use the

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829 So. 2d at 269 (stating that government restrictions on speech "must be justified").

parks. *Cf. Jews for Jesus*, 482 U.S. at 574 (indicating that the government could regulate expressive activity "that might create problems such as congestion or the disruption of the activities of those who use" the airport). The Department also has a significant interest in keeping sidewalks free of congestion and ensuring "free and safe public passage on the streets." *See Bery v. City of New York*, 97 F.3d 689, 697 (2d Cir. 1996). Time, place, and manner regulations are allowed in order to avoid overburdening traffic flow and to prevent conflicting parades in the same place or overloud speakers in a peaceful place. *Grayned*, 408 U.S. at 115-16. Under federal precedents, the Department's rule prohibiting safety hazards and interference with other park activities protects significant state interests.

The federal courts are reasonably lenient in reviewing content-neutral rules as to whether they are "narrowly tailored" to advance a significant state interest. *See Bery*, 97 F.3d at 696 (noting that strict scrutiny is used for content discrimination, but a more lenient standard for content-neutral regulations). This criterion is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rock Against Racism*, 491 U.S. at 799. The words of a law may be characterized by "flexibility and reasonable breadth rather than meticulous specificity" if it is clear what the law as a whole prohibits. *Grayned*, 408 U.S. at 110. Some deference is given to a governmental entity "in determining how much protection is necessary and the best method of achieving that protection. . . ." *Harnish v. Manatee County*, 783 F.2d 1535, 1539 (11th Cir. 1986) (upholding ban on portable advertising signs). This Court has declared that it is not the province

of the judiciary "to judge how much protection of park lands is wise and how that level of conservation is to be attained." *Clark*, 468 U.S. at 299 (upholding park rule in face of First Amendment challenge).

The parks' free speech rule meets this standard. It advances the government's substantial interest in promoting the safety of humans and habitat and managing conflicting park uses, while welcoming free speech activities. These interests would be achieved less effectively without the regulation. Although parks are a public forum, this does not mean that every manner of free speech activity is suitable at every location and time within each of Florida's 155 parks. *See Naturist*, 958 F.2d at 1523 (noting that park managers may consider "the special character of public beaches"); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 533-34 (1981) (Brennan, J., concurring) (stating that billboards likely could be banned entirely in Yellowstone, "where their very existence would so obviously be inconsistent with the surrounding landscape"). Whether a type of demonstration will be disruptive depends on "[t]he nature of a place, 'the pattern of its normal activities.'" *Grayned*, 408 U.S. at 116; *accord, United States v. Doe*, 968 F.2d at 91 ("the nature and purposes of the setting, along with its ambient characteristics"). These are precisely the criteria that guide park managers' discretion under this rule.

Finally, this rule leaves open ample alternative channels of communication. *See Rock Against Racism*, 491 U.S. at 802 (finding this requirement "easily met" where no showing was made that remaining avenues of communication were inadequate). The purpose of the rule is to *encourage* free speech activities in the parks. (Final Order, Init. Brief App. at 37.) In fact, the only evidence allegedly

showing frustration of expressive activity in Florida state parks involves park managers' efforts to enforce the nudity ban, which is not at issue in this case. (Tr. at 156, 161.) The park rule is a valid time, place, and manner regulation. On balance, it "furthers, rather than constricts, free speech." *See Thomas*, 534 U.S. at 325.

None of Petitioner's allegedly conflicting cases are pertinent to this facial challenge to the park rule. Some address content discrimination. *E.g., Keyshian v. Board of Regents*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964). Some address laws with no narrowing state court interpretation. *E.g., Morales*, 527 U.S. 41. Most address systems of prior restraint on speech. *E.g.*, cases listed at 7, *supra*. The remainder address *as-applied* challenges to the law. *E.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995); *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *National Association of Colored People v. Button*, 371 U.S. 415 (1963). This Court has stated that a law should not be stricken facially unless it is *substantially* defective. *Erznoznik*, 422 U.S. at 216; *accord, Fernandes*, 663 F.2d at 633. There is no compelling reason for this Court to grant review.

CONCLUSION

The park rule in question requires no form of prior permission for communicative activities, has been narrowly construed by the state court, and is content-neutral. In rejecting Petitioner's facial challenge to the rule, the state court properly stated and applied the rule of law for

time, place, and manner restrictions on speech. Certiorari review should be denied

Dated: September 10, 2003.

Respectfully submitted,

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